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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Application by SBC Communications Inc., )  
Southwestern Bell Telephone Company, and )  
Southwestern Bell Communications Services, ) CC Docket No. 00-4  
Inc. d/b/a Southwestern Bell Long Distance )  
for Provision of In-Region, InterLATA )  
Services in Texas )

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EVALUATION OF THE  
UNITED STATES DEPARTMENT OF JUSTICE

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<b>Federal Filings and Orders</b>	
DOJ Louisiana II Evaluation	Evaluation of the United States Department of Justice, <i>In re: Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana</i> , CC Docket No. 98-121 (Aug. 19, 1998).
DOJ New York Evaluation	Evaluation of the United States Department of Justice, <i>In re: Application by New York Telephone Company (d/b/a Bell Atlantic - New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York</i> , CC Docket No. 99-295 (Nov. 1, 1999).
DOJ Oklahoma Evaluation	Evaluation of the United States Department of Justice, <i>In re: Application of SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in the State of Oklahoma</i> , CC Docket No. 97-121 (May 16, 1997).
FCC New York Order	Memorandum Opinion and Order, <i>In re: Application by New York Telephone Company (d/b/a Bell Atlantic - New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York</i> , No. FCC 99-404, 1999 WL 1243135 (Dec. 22, 1999), <i>appeal pending sub nom., AT&amp;T v. FCC</i> , No. 99-1538 (D.C. Cir.).
FCC SBC-Ameritech Merger Order	Memorandum Opinion and Order, <i>In re: Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules</i> , No. FCC 99-279, 1999 WL 809551 (Oct. 8, 1999), <i>appeal pending sub nom., Telecommunications Resellers Ass'n v. FCC</i> , No. 99-1441 (D.C. Cir.).

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<b>State Orders</b>	
<i>New York PSC Order</i>	Order Directing Improvements to Wholesale Service Performance, <i>In re: Complaint of MCI WorldCom, Inc. against Bell Atlantic-New York concerning Billing Completion Notices, Firm Order Commitments, Acknowledgments and Tracking Numbers, filed in 99-C-1529 and Complaint of AT&amp;T Communications of New York, Inc. against Bell Atlantic-New York concerning Acknowledgments, Completion Notices and Pre-Order Outages, filed in 99-C-1529</i> , State of New York Public Service Comm'n, Case No. 00-C-0008 (Feb. 11, 2000), available at < <a href="http://www.dps.state.ny.us/fileroom/doc7243.pdf">http://www.dps.state.ny.us/fileroom/doc7243.pdf</a> >.
<b>Filings Related to SBC's Application</b>	
SBC Brief	Brief in Support of Application by Southwestern Bell for Provision of In-Region InterLATA Services in Texas, <i>In re: Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas</i> , CC Docket No. 00-4 (Jan. 10, 2000).
SBC 1999 Aggregated Performance Data	SBC Telecommunications, Inc., State of Texas Performance Measurements Aggregation for January 1999-December 1999, <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-4 (Feb. 1, 2000).
SBC 1999 Disaggregated Performance Data	SBC Telecommunications, Inc., State of Texas Disaggregated Performance Measurements for January 1999-December 1999, <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-4 (Feb. 2, 2000).
SBC DSL Delay Days <i>Ex Parte</i>	SBC Telecommunications, Inc., Corrected Tracking/Chart Results for Performance Measurement 62-09 ("Average Delay Days for SWBT Missed Due Dates") (Digital Subscriber Line (DSL)), <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-4 (Feb. 7, 2000).
SBC Hot Cut <i>Ex Parte</i>	SBC Telecommunications, Inc., Responses to FCC Staff Questions About SBC's Hot Cut Performance, <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-4 (Jan. 21, 2000).
SBC Reject and Flow Through Rate <i>Ex Parte</i>	SBC Telecommunications, Inc., Materials Addressing Several Aspects of SBC's OSS Performance, Including Reject and Flow-Through Rates for All CLECs Using the EDI and LEX Interfaces, <i>Ex Parte</i> Submission to the FCC, CC Docket No. 00-4 (Jan. 21, 2000).

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Texas PUC Evaluation	Evaluation of the Public Utility Commission of Texas, <i>In re: Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas</i> , CC Docket No. 00-4 (Jan. 31, 2000).
Comments of third parties are referred to as “[Party Name] Comments.”	
<b>Affidavits/Declarations</b>	
Allegiance Howland Decl.	Declaration of Elizabeth A. Howland, attached to Allegiance Comments as Attach. 2.
AT&T Dalton/DeYoung Decl.	Declaration of Nancy M. Dalton and Sarah DeYoung, attached to AT&T Comments as Ex. I.
AT&T DeYoung Hot Cuts Decl.	Declaration of Sarah DeYoung, attached to AT&T Comments as Ex. D.
AT&T Holtz Decl.	Declaration of Clifford S. Holtz, attached to AT&T Comments as Ex. E.
AT&T Kelley/Turner Decl.	Declaration of A. Daniel Kelley and Steven E. Turner, attached to AT&T Comments as Ex. A.
AT&T Pfau/DeYoung Decl.	Declaration of C. Michael Pfau and Sarah DeYoung, attached to AT&T Comments as Ex. K.
Birch Tidwell/Kettler Aff.	Joint Affidavit of Richard L. Tidwell and Patricia Ann Kettler on behalf of Birch Telecom, attached to CLEC Coalition Comments as Attach. 6.
CapRock Thompson Aff.	Affidavit of Jere Thompson on behalf of CapRock Communications, attached to CompTel Comments as Ex. B.
Covad Smith Decl.	Declaration of Michael Smith, attached to Covad Comments as Tab 2.
Covad Wall Decl.	Declaration of Matthew Wall, attached to Covad Comments as Tab 3.
DOJ Schwartz Aff.	Affidavit of Dr. Marius Schwartz on behalf of the U.S. Department of Justice (May 14, 1997), available at < <a href="http://www.usdoj.gov/atr/public/comments/sec271/bellatlantic/3813_exhibits.htm">http://www.usdoj.gov/atr/public/comments/sec271/bellatlantic/3813_exhibits.htm</a> >, and attached to DOJ New York Evaluation as Ex. 1.

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DOJ Schwartz Supplemental Aff.	Supplemental Affidavit of Marius Schwartz on Behalf of the U.S. Department of Justice (Nov. 3, 1997), available at < <a href="http://www.usdoj.gov/atr/public/comments/sec271/bellatlantic/3813_exhibits.htm">http://www.usdoj.gov/atr/public/comments/sec271/bellatlantic/3813_exhibits.htm</a> >, and attached to DOJ New York Evaluation as Ex. 2.
e.spire Wong Aff.	Affidavit of George Wong on behalf of e.spire Communications, attached to e.spire Comments.
ICG Rowling Aff.	Affidavit of Gwen M. Rowling on behalf of ICG Communications, attached to CLEC Coalition Comments as Attach. 7.
Network Intelligence Burk Aff.	Affidavit of Richard E. Burk on behalf of Network Intelligence, attached to CompTel Comments as Ex. A.
Nextlink Barron Aff.	Affidavit of Lea J. Barron on behalf of Nextlink, attached to CLEC Coalition Comments as Attach. 3.
Nextlink Draper Aff.	Affidavit of Michael L. Draper on behalf of Nextlink, attached to CLEC Coalition Comments as Attach. 1.
Nextlink Smith Aff.	Affidavit of Carrie J. Smith on behalf of Nextlink, attached to CLEC Coalition Comments as Attach. 2.
NorthPoint Lewandowski Aff.	Affidavit of Jessica Lewandowski, attached to NorthPoint Comments as App. A.
Northpoint Mailloux Aff.	Affidavit of Christine A. Mailloux, attached to NorthPoint Comments as App. B.
NTS Elliott Aff.	Affidavit of Mitch Elliott on behalf of NTS Communications, attached to CompTel Comments as Ex. C.
Rhythms Lopez/Baros Aff.	Affidavit of Ann M. Lopez and Fred Baros on behalf of Rhythms Links Inc., attached to Rhythms Comments as Attach. 1.
SBC & AT&T Royer/Van de Water Joint Aff.	Joint Affidavit of Mark Van De Water and Robert J. Royer, <i>In re: Investigation into Southwestern Bell Telephone Company's Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996</i> , Public Utility Comm'n of Texas, Proj. No. 16251 (Dec. 16, 1999), attached to SBC Brief, App. C, Vol. 142 as Tab 2018.

Index of Full Citations	
SBC Chapman Aff.	Affidavit of Carol A. Chapman, attached to SBC Brief, App. A, Vol. A-2 as Tab 2.
SBC Conway Aff.	Affidavit of Candy R. Conway, attached to SBC Brief, App. A, Vol. A-4 as Tab 3.
SBC Dec. 15, 1999 Conway Aff.	Affidavit of Candy R. Conway, <i>In re: Investigation into Southwestern Bell Telephone Company's Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996</i> , Public Utility Comm'n of Texas, Proj. No. 16251 (Dec. 15, 1999), attached to SBC Brief, App. C, Vol. 141 as Tab 2013.
SBC Dec. 15, 1999 Dysart Aff.	Affidavit of William R. Dysart, <i>In re: Investigation into Southwestern Bell Telephone Company's Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996</i> , Public Utility Comm'n of Texas, Proj. No. 16251 (Dec. 15, 1999), attached to SBC Dysart Aff. as Attach. U.
SBC Dec. 15, 1999 Leathers Aff.	Affidavit of Laurie Leathers, <i>In re: Investigation into Southwestern Bell Telephone Company's Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996</i> , Public Utility Comm'n of Texas, Proj. No. 16251 (Dec. 15, 1999), attached to SBC Brief, App. C, Vol. 142 as Tab 2015.
SBC Deere Aff.	Affidavit of William C. Deere, attached to SBC Brief, App. A, Vol. A-2 as Tab 3.
SBC Dysart Aff.	Affidavit of William R. Dysart, attached to SBC Brief, App. A, Vol. A-5 as Tab 1.
SBC Habeeb Aff.	Affidavit of John S. Habeeb, attached to SBC Brief, App. A, Vol. A-1 as Tab 1.
SBC Habeeb Confidential Aff.	Affidavit of John S. Habeeb, attached to SBC Brief, Proprietary Materials, Vol. 14 as Tab 63.
SBC Ham Aff.	Affidavit of Elizabeth A. Ham, attached to SBC Brief, App. A, Vol. A-4 as Tab 1.



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SBC Oct. 20, 1999 Habeeb Aff.	Affidavit of John S. Habeeb, <i>In re: Investigation into Southwestern Bell Telephone Company's Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996</i> , Public Utility Comm'n of Texas, Proj. No. 16251 (Oct. 20, 1999), attached to SBC Brief, App. C, Vol. 132 as Tab 1839.
Time Warner Reeves Aff.	Affidavit of Kelsi W. Reeves on behalf of Time Warner Telecom, attached to CLEC Coalition Comments as Attach. 5.
Time Warner Summitt Aff.	Affidavit of Nick Summitt on behalf of Time Warner Telecom, attached to CLEC Coalition Comments as Attach. 4.
<b>Attachments to Affidavits/Declarations</b>	
DOJ Performance Measures Letter	Letter from Donald Russell, Chief, Telecommunications Task Force, U.S. Dep't. Of Justice, to Liam S. Coonan, Senior Vice President and Assistant General Counsel, SBC Communications, Inc. (Mar. 6, 1998), attached to SBC Dysart Aff. as Attach. E.
Telcordia Final Report	Telcordia Technologies, <i>The Public Utility Commission of Texas: Southwestern Bell OSS Readiness Report</i> (Sept. 1999), available at < <a href="http://www.puc.state.tx.us/telecomm/projects/20000/download.cfm">http://www.puc.state.tx.us/telecomm/projects/20000/download.cfm</a> > and attached to SBC Ham Aff. as Attach. A.
Texas PUC Staff Performance Measures Evaluation	PUC's Evaluation of SWBT's Performance Measure Data, <i>In re: Investigation into Southwestern Bell Telephone Company's Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996</i> , Public Utilities Comm'n of Texas, Project No. 16251 (Nov. 2, 1999), attached to SBC Brief, App. C, Vol. 135 as Tab 1942.
<b>Other</b>	
Business Rules 1.6	Performance Measurement Business Rules (Version 1.6), attached to SBC Dysart Aff. as Attach. A.
Dec. 16, 1999 Open Meeting Tr.	Open Meeting Transcript, <i>In re: Investigation into Southwestern Bell Telephone Company's Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996</i> , Public Utility Comm'n of Texas, Proj. No. 16251 (Dec. 16, 1999), attached to SBC Brief, App. C-1, Vol. 19, Tab 212.

<b>Attachments to this Evaluation</b>	
<b>Short Citation</b>	<b>Full Citation</b>
DOJ Ex. 1: SBC's Disaggregated Access Line Data	E-mail from Martin E. Grambow, Vice President and General Counsel, SBC Telecommunications, Inc., to Katherine Brown, Attorney, U.S. Department of Justice, Attach. (Feb. 3, 2000) (SBC's statement of SBC and CLEC line counts, disaggregated by customer type and method of service delivery, for September through December 1999), attached to this Evaluation as Ex. 1.
DOJ Ex. 2: SBC's Statement of September CLEC Line Counts	E-mail from Martin E. Grambow, Vice President and General Counsel, SBC Telecommunications, Inc., to Katherine Brown, Attorney, U.S. Department of Justice (Feb. 7, 2000) (including SBC's statement of aggregate CLEC line counts as of the end of September 1999), attached to this Evaluation as Ex. 2.
DOJ Ex. 3: SBC DSL E-mail	E-mail from Martin E. Grambow, Vice President and General Counsel, SBC Telecommunications, Inc., to Luin Fitch, Attorney, U.S. Department of Justice (Feb. 7, 2000) (providing a response to specific DSL-related questions), attached to this Evaluation as Ex. 3.
DOJ Ex. 4: Letter from Bell Atlantic to New York PSC	Letter from Paul A. Crotty, Group President, Bell Atlantic-New York, to the Honorable Maureen O. Helmer, Chairman, New York State Public Service Commission (Feb. 4, 2000), attached to this Evaluation as Ex. 4.

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Services in Texas	)	

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**EVALUATION OF THE  
UNITED STATES DEPARTMENT OF JUSTICE**

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**Introduction and Summary**

SBC has filed an application for long distance entry in Texas that shows substantial progress in the development of local competition in that state. In sharp contrast to its earlier application for Oklahoma, which failed to meet even the threshold requirements of section 271,<sup>1</sup> this application demonstrates that the ground rules for competition have been largely established, that SBC has implemented most of the operational details of providing access and interconnection to its competitors and that numerous carriers are beginning to compete in offering a wide range of services. This progress reflects well on SBC, which has devoted substantial resources towards implementation of the requirements of the Telecommunications

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<sup>1</sup> 47 U.S.C. § 271 (1996).

Act,<sup>2</sup> and on the Texas Public Utility Commission (“Texas PUC”) and its staff, which has worked tirelessly to create an environment in which competition may emerge.

This Evaluation by the Department of Justice principally focuses on SBC’s actual commercial performance in providing access and interconnection. In a great many respects, despite some continuing start-up problems, that performance appears to be adequate. In the critical area of providing unbundled loops for advanced services, however, SBC’s application is clearly deficient. In this proceeding, the Federal Communications Commission (“Commission”) must decide concretely how it will interpret and apply the requirements of section 271 to provide access to such unbundled loops. It is very important for the Commission to ensure that SBC satisfies those requirements, for a failure to do so will seriously retard the deployment of such services and competition in their provision. SBC has not demonstrated that it is providing non-discriminatory treatment to competitors offering xDSL services, or that its planned (but not implemented) use of a separate affiliate to provide such services will address this shortcoming. The Commission should deny SBC’s application because of its deficiencies in this area.

There are other shortcomings in this application. In its recent decision approving Bell Atlantic’s section 271 application for New York, the Commission found Bell Atlantic’s performance in providing “hot cuts” of unbundled loops to be “minimally acceptable.” As best we can determine, SBC’s performance in this area falls short of that “minimally acceptable”

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<sup>2</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in various sections of 47 U.S.C.).

level. Because of SBC's deficient performance, carriers seeking to use unbundled loops are constrained, and the market is not fully open to competition.

Finally, the record leaves considerable doubt about whether SBC can provide interconnection trunks in a timely manner, and whether carriers will be able to compete effectively using the UNE-platform. A careful analysis of additional commercial experience, through the entirety of the current quarter, will provide valuable evidence of whether recently implemented measures have successfully resolved problems in these areas, and whether SBC's wholesale support systems will function adequately as the volume of CLEC activity increases. Because of the limitations of time and information, and because of the critical need to protect the fairness and efficacy of the Commission's process for reviewing section 271 applications, a review of this additional experience should *not* be attempted in connection with the current application. But since this application should be denied in any event because of the deficiencies relating to DSL and hot cut loops, we recommend that the Commission defer judgment on interconnection and UNE-platform issues until a subsequent re-application, when it will have the benefit of evidence reflecting additional commercial experience.

#### **I. Laying The Foundation For Competition**

The Texas PUC has shown a great commitment to open the Texas market to local competition. Through a consolidated set of arbitrations known as the "mega-arbitration" and the subsequent nearly two-year 271 review process, the Texas PUC and its staff worked carefully and extensively to define the terms, conditions and operational details necessary for the development of competition in the state of Texas. Recognizing that the appropriate offering

terms are not a sufficient demonstration of market openness, the Texas PUC also contracted with Telcordia Technologies, Inc. to oversee a carrier-to-carrier readiness test of SBC's operational support systems, and the Texas PUC staff reviewed the reported commercial performance results.<sup>3</sup>

While providing some evidence of the functionality and capacity of SBC's operational support systems ("OSS"), Telcordia's test has significant limitations.<sup>4</sup> First, the Telcordia Final Report as written does not clearly identify all major problems encountered during the test, assess the impact of these problems on CLECs, or investigate the root causes of these problems. Second, the carrier-to-carrier style test used in Texas was limited primarily to the system capabilities of the two main test participants, AT&T and MCI WorldCom. Thus, unlike the test in New York, the Telcordia test was not broad enough to test the wholesale support processes for other CLECs with different target markets and business plans.<sup>5</sup> Third, Telcordia focused

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<sup>3</sup> The best proof that an incumbent local exchange carrier's ("ILEC") wholesale support processes work adequately is, of course, actual commercial use of the systems at substantial (that is to say, reasonably foreseeable open market) volumes. In the absence of such use, however, both the Department and the Commission have said that evidence from carrier-to-carrier testing, independent third-party testing, and internal testing may be used to demonstrate that the wholesale support processes are working and are capable of handling substantial commercial order volumes in the future. *See, e.g.*, DOJ Oklahoma Evaluation at 29-30; DOJ Louisiana II Evaluation at 26-27 & n.50; *FCC New York Order* ¶ 89.

<sup>4</sup> In offering these observations about the scope of the Telcordia test, we do not mean to criticize Telcordia, which oversaw the test in accordance with its instructions.

<sup>5</sup> Seven CLECs were test participants in the test, and of these, only two carriers, AT&T and MCI WorldCom, devoted the resources and time necessary to actively participate in the test of the EDI interface. Telcordia Final Report at 1-2; *see* Transcript of OSS Testing Workshop, *In re: Operations Support Testing Relating to the Investigation into Southwestern Bell Telephone Company's Entry into the InterLATA Communications Market in Texas*, Public

narrowly on SBC's computer systems and not on SBC's wholesale support systems generally.

Consequently, Telcordia's test does not provide evidence that SBC provides adequate wholesale services overall to CLECs in Texas.

Finally, and perhaps most importantly with respect to future applications, uncertainty remains regarding the validity of some of SBC's performance reports because Telcordia reviewed only a subset of the performance measures on which SBC reports. In evaluating the actual commercial experience of SBC's competitors, the Department and the Commission place great weight on the reported performance data; the reliability of the reported data is critical. To properly validate metrics, one must verify that they are meaningful, accurate and reproducible. *Meaningful metrics* require clear definitions that will allow measurement of activities or processes in a way that has real-world, practical significance. *Accurate metrics* are faithful to established definitions in that they are correctly calculated from the proper subset of raw data using processes that ensure the data are accurately handled and transferred. *Reproducible metrics* can be reproduced at future dates for verification purposes because the raw data have been archived for an appropriate period in a secure, auditable form and because changes to the systems

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Utility Comm'n of Texas, Proj. No. 20000, at 14 (July 22, 1999), attached to SBC Brief as App. D, Vol. 3, Tab 50. Moreover, Telcordia was unable to conduct an effective test of critical services like DSL due to the limitations of the test carrier. Telcordia Final Report at 76-80. Similarly, in part because of low participation, order volumes for the order types tested were low. *Id.* at 12.

and processes used for gathering and reporting metrics are carefully controlled and fully documented.<sup>6</sup>

Telcordia's review does not provide an adequate basis for determining that presently reported SBC performance data are reliable. First, Telcordia did not examine whether the metrics as defined are meaningful. Second, its review is too dated and limited to ensure the accuracy of current data.<sup>7</sup> Third, Telcordia's reviews, both in conjunction with the OSS test Final Report and its subsequent Performance Measures Data Control Integrity Analysis, identified concerns relating to the manual handling of performance data, the integrity of data files

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<sup>6</sup> The Department emphasized the importance of these matters in a letter to SBC on March 6, 1998. That letter referenced a list of agreed-upon performance measures for use by the Department in evaluating a section 271 application. The Department emphasized that proper implementation of these measures was critical, noting that "definitional issues and other details connected with the measures themselves (such as the basis upon which due dates and start and stop times are set in particular measures) could significantly affect the meaning of the data." DOJ Performance Measures Letter at Attach. E-1 to E-2. Unfortunately, the defects in SBC's implementation of its performance measures have become apparent only as CLECs have had access to performance reports, and an opportunity to detect inconsistencies between SBC's reports and their own experiences. If SBC had conducted a more careful review of its performance measurements and processes, whether through Telcordia or otherwise, these defects could have been detected and corrected earlier.

<sup>7</sup> Most of Telcordia's review focused on calculations made during the later stages of the reporting process on a relatively small subset of SBC's performance measures. In addition, it was based on an outdated version of the definitions of the performance measures. Telcordia Final Report at 151-53. Analysis based on the test data does not overcome these limitations because it was a small amount of data from carefully controlled, generally identifiable orders for a subset of measures and provided no information on critical measures like trunking, billing and number portability.



and the auditability of performance data.<sup>8</sup> Thus, we find that Telcordia's reviews do not assure the accuracy and reliability of SBC's performance data.

The third-party test that was part of the record in Bell Atlantic's New York application was broad, independent and robust and played a valuable role in opening that market to competition. In comparison, the Telcordia test in Texas was far less comprehensive, blind and independent, and therefore provides much less persuasive evidence.<sup>9</sup>

## **II. Competition In Local Telecommunications Markets In Texas**

As the Department has previously stated, in-region, interLATA entry by a Bell Operating Company ("BOC") should be permitted only when the local market in a state has been fully and irreversibly opened to competition.<sup>10</sup> In applying this standard, the Department examines whether all three entry paths contemplated by the 1996 Telecommunications Act -- facilities-based entry involving construction of new networks, the use of unbundled elements of the BOC's network and resale of the BOC's services -- are fully and irreversibly open to competitive entry to serve both business and residential customers. To do so, the Department looks first to *actual* competitive entry. The actual experience of competitors seeking to enter a market can provide

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<sup>8</sup> See, e.g., Telcordia Final Report at 145-46; Telcordia Technologies, Performance Measures Data Control Integrity Analysis at 3, 12 (Dec. 1999), attached to SBC Dysart Aff. as Attach. O.; SBC Dysart Aff. ¶ (archiving process to be improved by May-June 2000).

<sup>9</sup> *FCC New York Order* ¶ 100 ("[W]ere a third party test less comprehensive, less independent, less blind, and, therefore, less useful in assessing the real world impact of a BOC's OSS on competing carriers, we would not necessarily find it persuasive and may accord it less weight than we do the KPMG Final Report.").

<sup>10</sup> See DOJ Schwartz Aff. ¶¶ 149-192; DOJ Schwartz Supplemental Aff. ¶¶ 26-60; DOJ Oklahoma Evaluation at vi-vii, 36-51.

highly probative evidence concerning the presence, or absence, of artificial barriers to entry. The degree to which such existing competition is broad-based determines the weight the Department places on it as evidence. For any entry path where competitively significant entry is reasonably foreseeable but broad-based commercial entry is still absent, the Department examines whether new technical and operational arrangements are available and shown to be working to support the entry mode and whether benchmarks to prevent backsliding by the incumbent have been established.<sup>11</sup>

In its application, SBC contends that CLECs serve 1,408,558 lines, or 12.8 percent of the total number of access lines in SBC's Texas service area.<sup>12</sup> We presume that SBC's estimates of the number of resale and UNE access lines (both UNE-loop and UNE-platform) are accurate, since SBC, in its role as a wholesaler, should possess reliable information about CLEC activity in these areas. However, SBC appears to have substantially over-estimated the number of lines served by facilities-based carriers, about which it has no direct evidence.<sup>13</sup> While SBC estimates that CLECs had 920,140 full facilities-based lines in service in November 1999,<sup>14</sup> we believe that

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<sup>11</sup> As we have stated previously, the Department does not regard small market shares held by competitors, or even the absence of entry (either altogether or using a particular entry path), standing alone, as conclusive evidence that a market remains closed to competition or as a basis for denying an application under section 271. *See supra* note 3.

<sup>12</sup> SBC Habeeb Aff., Attach. E at 1; *see also* DOJ Ex. 1: SBC's Disaggregated Access Line Data (9,624,336 SBC retail lines; 11,032,894 total lines in SBC's serving area).

<sup>13</sup> SBC groups UNE and full facilities-based entry together under the heading of "facilities-based" entry. We make the distinction to avoid confusion.

<sup>14</sup> SBC's estimate that CLECs had 1,086,407 "facilities-based" lines in November 1999 yields 920,140 full facilities-based lines when UNE-loop and UNE-platform lines are

a more reasonable estimate is 350,000-400,000.<sup>15</sup> Using our estimate, CLECs have a total of approximately 840,000-890,000 access lines, about eight percent of SBC's Texas market. A CLEC market share of eight percent of local services is significantly above the national average of five percent,<sup>16</sup> but the level of CLEC penetration in Texas appears to be somewhat less than that seen in New York at the time of Bell Atlantic's application, where CLECs collectively had achieved approximately an 8.9 percent market share.<sup>17</sup>

A substantial amount of CLEC entry in Texas is primarily by full facilities-based providers serving urban, business customers.<sup>18</sup> CLECs use UNE-loops and the UNE-platform to

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subtracted. *See* DOJ Ex. 1: SBC's Disaggregated Access Line Data; SBC Habeeb Aff., Attach. E at 1.

<sup>15</sup> To estimate the number of full facilities-based lines, SBC multiplied the number of interconnection trunks to each CLEC switch by a factor of 2.75. *See* SBC Habeeb Aff. ¶ 23. Although we believe it is reasonable to use the number of interconnection trunks in order to estimate the number of CLEC access lines, SBC's factor of 2.75 appears to be much too high. A more reasonable multiplier, in our view, would be close to one; the ratio of CLEC full facilities-based lines to CLEC trunks was .97 in August and 1.04 in September. *See* Texas PUC Evaluation at 102 (266,734 lines in August and 317,865 lines in September); SBC Oct. 20, 1999 Habeeb Aff. ¶ 34 (274,184 trunks in August); DOJ Ex. 2: SBC's Statement of September CLEC Line Counts (306,071 trunks in early October); *see also* Allegiance Howland Decl. ¶¶ 4-5 (SBC overstates Allegiance's full facilities-based lines by 123% in Dallas and 190% in Houston.); AT&T Kelley/Turner Aff. ¶ 20. Our estimate uses a factor of one. *See* SBC Habeeb Aff., Attach. E at 1 (347,830 CLEC interconnection trunks as of December 9, 1999).

<sup>16</sup> Federal Communications Commission, *Local Competition: August 1999 Report*, Press Release (Aug. 31, 1999) (CLECs' "presence remains less than 5% of the local market."), available at <[http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/lec.html](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/lec.html)>, follow link <LCOMP99-1.PDF>.

<sup>17</sup> *See* DOJ New York Evaluation at 9.

<sup>18</sup> *See* Texas PUC Evaluation at 102; SBC Habeeb Aff., Attach. E at 1; SBC Habeeb Confidential Aff. ¶ 28, Table 3.

serve a small, but competitively important number of business customers. Residential customers have historically been served through resale. Many residential customers are now receiving UNE-platform based service. The record in this application does not raise concerns about competitive entry for CLECs choosing to resell SBC's retail services, but the more limited amount of competition using other modes of entry requires us to closely examine the market conditions that affect those other modes of entry.

As we explain below, the Department has concluded that markets for local services in Texas are not fully and irreversibly open to competition by carriers seeking to offer advanced services using unbundled xDSL-capable loops, or by carriers seeking to offer services using unbundled voice-grade loops. The record also raises significant doubts about the ability of facilities-based competitors to obtain adequate access to interconnection trunks, and about the ability of other carriers to compete effectively using the UNE-platform.

### **III. SBC Has Not Met Its Burden of Demonstrating That It Is Providing Non-Discriminatory Access to DSL Loops.**

In the recent *New York Order*, the Commission stated that applicants for 271 approval should "make a separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops . . . ."<sup>19</sup> The Department emphatically agrees. Such a separate showing is vitally important because DSL technology, using copper wire loops that are ubiquitous throughout the telephone network, offers one of the best prospects for broadband services. In the

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<sup>19</sup> *FCC New York Order* ¶ 330. The Commission did not require such a showing in New York because of the unique circumstances there. SBC has not argued that such unique circumstances exist in Texas.

*New York Order*, the Commission set forth two methods that an applicant may use to show that it provides DSL loops to CLECs in a nondiscriminatory manner. First, the Commission indicated that the establishment of a “fully operational”<sup>20</sup> separate affiliate for advanced services “may provide significant evidence” of nondiscrimination.<sup>21</sup> Second, the Commission stated that 271 applicants could demonstrate that they are providing nondiscriminatory access to DSL-capable loops through comprehensive and accurate reports of performance measures even without a separate affiliate.<sup>22</sup>

[W]e emphasize our strong preference for a record that contains data measuring a BOC's performance pursuant to state-adopted standards that were developed with input from the relevant carriers and that include clearly-defined guidelines and methodology. . . . Accordingly, we encourage state commissions to adopt specific xDSL loop performance standards measuring, for instance, the average completion interval, the percent of installation appointments missed as a result of the BOC's provisioning error, the timeliness of order processing, the installation quality of xDSL loops provisioned, and the timeliness and quality of the BOC's xDSL maintenance and repair functions.<sup>23</sup>

SBC states that the record in this proceeding contains sufficient evidence to satisfy the Commission's separate affiliate alternative as well as performance data to prove that it is providing nondiscriminatory treatment of CLEC orders for DSL-capable loops.<sup>24</sup> We disagree and find that SBC cannot satisfy either requirement. SBC's performance data are fundamentally

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* ¶ 331.

<sup>22</sup> *Id.* ¶¶ 333-335.

<sup>23</sup> *Id.* ¶ 334.

<sup>24</sup> SBC Brief at iii-iv, 39-44.

flawed in some cases, and in other cases reveal significant discrimination. SBC fails to show that its proposal to offer DSL services through a separate affiliate will be adequate to prevent a continuation of this discrimination.

**A. SBC's DSL Performance Data Are Unreliable.**

As a critical threshold matter, it appears that key portions of the DSL performance data that SBC has submitted to the Commission are seriously flawed. In some cases, SBC has acknowledged important facts that preclude reliance on these performance data. In other cases, serious questions about the reliability of the data have been raised by commenters. In the context of the known inadequacies in the data, we believe these questions should be resolved before placing any reliance on the challenged data.

**1. Data Regarding SBC's Provision of Loop Make-Up Information**

Performance Measure ("PM") 57 is a measure of the time within which SBC provides loop make-up (or "qualification") information in response to CLECs' requests for such information. SBC has been on notice at least since the publication of the Commission's order approving the merger of Ameritech and SBC of the appropriate way to measure these response times: "The time starts when a request is received by the CLEC [*sic*, ILEC] and ends when the information on the loop qualification has been made available to the CLEC."<sup>25</sup> Notwithstanding this clear, common sense definition, the data submitted by SBC to the Texas PUC and to the Commission measure only the time SBC's representative worked on the request, and exclude

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<sup>25</sup> *FCC SBC-Ameritech Order*, App. C, Attach. A at A-34.

both the period of time the request was with SBC before the representative started working on it and the period of time the response remained with SBC after the representative's work was completed. Excluding these time periods will obviously understate the length of time it actually takes SBC to respond to CLEC requests for loop qualification information.<sup>26</sup> Although the Texas PUC stated that SBC had been ordered to fix this problem and that SBC had implemented the change, the Texas PUC apparently relied upon the faulty data when it reported in its comments that PM 57 shows SBC's statewide performance for September through November exceeded the parity requirement.<sup>27</sup> SBC has acknowledged to the Department that its PM 57 performance data through December, which were submitted to the Commission on February 1, 2000, also fail to capture these two important time periods.<sup>28</sup> Given this flaw in the data, they cannot be relied upon to show parity in this dimension of performance.

## **2. Data Regarding Firm Order Confirmations ("FOCs") for DSL Loop Orders**

In response to the Department's questions concerning Covad's complaint that SBC had excluded most of its orders from Covad-specific reports for PM 5 ("Percent Firm Order Confirmations (FOCs) Received Within "X" Hours") and PM 6 ("Average Time to Return FOC

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<sup>26</sup> NorthPoint Comments at 11-12. In addition, NorthPoint states that the information that SWBT provides on loop make-up is often wrong. *Id.* at 15; NorthPoint Lewandowski Aff. ¶¶ 11-16.

<sup>27</sup> Texas PUC Evaluation at 63-64.

<sup>28</sup> DOJ Ex. 3 : SBC DSL E-mail at 2; *see also* Covad Comments at 31 (stating that Covad's actual loop qualification experience exceeds the response times reported by SBC).

(Hours)”), which measure SBC performance regarding FOC timeliness,<sup>29</sup> SBC has acknowledged that it excluded DSL FOCs from its performance measures. SBC asserted that “[t]he business rule for FOC was developed prior to August 1999, and did not contemplate DSL”<sup>30</sup> though in fact, the business rule does not provide for any exclusion of DSL loops.<sup>31</sup>

The actual experience reported by the CLECs in their comments suggests that delays in receiving FOCs for DSL orders are lengthy and that such delays impair CLECs’ ability to compete.<sup>32</sup> Clearly, the data on FOC timeliness submitted with this application cannot be relied upon to support a conclusion that SBC is supplying DSL competitors with timely order confirmations.

### **3. Data Regarding Missed Due Dates for DSL Loops**

Another incident that casts doubt on the reliability of SBC’s performance data relates to data for PM 62 (“Average Delay Days for SWBT Caused Missed Due Dates”), which the Texas PUC has designated as a Tier 1 and 2 performance measure.<sup>33</sup> In reports submitted to this Commission and the Texas PUC as recently as February 1, 2000, SBC reported that the average

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<sup>29</sup> Covad Comments at 27-28; Covad Wall Decl. ¶¶ 14-15.

<sup>30</sup> DOJ Ex. 3: SBC DSL E-mail at 2.

<sup>31</sup> SBC Dysart Aff., Attach. A at 12-14.

<sup>32</sup> NorthPoint Comments at 16; NorthPoint Lewandowski Aff. ¶¶ 17, 21; Rhythms Comments at 35; Rhythms Lopez/Baros Aff. ¶ 18; Covad Comments at 27-28.

<sup>33</sup> *See infra* note 43.



number of “delay days” was “0.00” for September through December 1999.<sup>34</sup> This statistic might have led one to infer that there was little competitive significance in SBC’s failure to install a DSL-capable loop at the time promised on the FOC because the average reported delay in installing such loops was insignificant. After SBC was asked to demonstrate how the reported result was mathematically possible, it filed a correction, discussed below, which shows a significant disparity between average delays for CLECs and average delays for SBC’s retail operations in November and December.<sup>35</sup>

#### **4. Data Regarding DSL Installation**

The performance measure for the average installation interval for DSL loops (PM 55.1) is one of the most competitively significant indicators of a DSL provider’s ability to compete with SBC. SBC’s reported data should not be relied upon to show nondiscrimination, absent a complete examination of the accuracy of the reported data.

The data for PM 55.1 that SBC submitted with its application failed to reflect data for a majority of the loops provisioned by SBC. After NorthPoint pointed out that none of its DSL loops had been tracked in PM 55.1, even though it had submitted more than 900 orders for DSL loops,<sup>36</sup> SBC acknowledged that a processing error had resulted in a substantial portion of DSL

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<sup>34</sup> SBC 1999 Aggregated Performance Data, Measurement No. 62 (“Average Delay Days for SWBT Caused Missed Due Dates”) (Digital Subscriber Line-DSL) at 271-No. 62c.

<sup>35</sup> *Compare id. with* SBC DSL Delay Days *Ex Parte*, Tab 1 (correcting the aggregate performance data filed for PM 62 on February 1, 2000).

<sup>36</sup> NorthPoint Comments at 2.